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In the

Supreme Court of the United States

OCTOBER TERM, 1962

No. 510

TEXAS CARBONATE COMPANY,
Petitioner,

v.

R. L. PHINNEY, DISTRICT DIRECTOR OF INTERNAL REVENUE,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit in Cause No. 18,854

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INDEX

	Page
GROUNDS FOR JURISDICTION	2
SUMMARY AND STATEMENT	3
QUESTION PRESENTED	4
THE FACTS	5
CONCLUSION	11

Page

NEW DEAL CAB CO. v. FAHS, 174 F. 2d 318 9
UNITED STATES v. THORSON, 282 F. 2d 157 2
ZIPSER v. EWING, 197 F. 2d 728 2

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Texas Carbonate Company, a corporation chartered and existing under the laws of the State of Texas with its principal office at Florence, in Williamson County, Texas, respectfully prays that this Honorable Court issue a Writ of Certiorari and review the decision of the United States Court of Appeals for the Fifth Circuit, rendered on the 7th day of August, 1962, by which the judgment and order of the District Court for the Western District of Texas, sitting at Austin (Exhibit A), was affirmed as appears from the opinion of His Honor Mr. Circuit Judge Jones (Exhibit B).

GROUNDS FOR JURISDICTION

1. This Honorable Court has jurisdiction to grant this application for Writ of Certiorari and to review the opinion and judgment of the Honorable Court of Appeals for the Fifth Circuit in the matter of Texas Carbonate Company v. R. L. Phinney for that there is presented the question of the proper construction of Sec. 1426(d) (1) and (2), and Sec. 1607(1) of the Internal Revenue Code of 1939 as they read after amendment by Congress.

2. This Honorable Court has jurisdiction to grant this application for Writ of Certiorari for that the opinion of the Court of Appeals for the Fifth Circuit in this case is directly contrary to the opinion of Mr. Chief Judge Woodbury in the case of *United States v. Thorson, 282 F. 2d 157 et seq.*, decided by the Court of Appeals for the First Circuit.

3. This Honorable Court has jurisdiction to grant this application for that the opinion of the Court of Appeals for the Fifth Circuit is directly contrary to the opinion of Mr. Circuit Judge Frank for the Court of Appeals for the Second Circuit in the case of *Zipser v. Ewing, 197 F. 2d 728*, who uses this language:

> "The 1948 Amendment in explicit terms retroactively defined 'employee' so as to make applicable the common law definition."

As defined by the common law, L. H. Miller was clearly not an employee.

SUMMARY AND STATEMENT

Late in 1938 L. H. Miller located a deposit of natural limestone powder and in January, 1939 caused Texas Carbonate Company to be chartered, with six stockholders and six directors, including himself. At a Directors meeting it was determined that someone would have to sell the company's product. The board offered to hire L. H. Miller on a salary, which he refused; but on the 14th of March, 1939, he did agree to sell the company's product on a commission basis as per resolution of the Directors bearing that date, which reads:

> "Further resolved, in accordance with the previous discussion of all the directors, that Mr. L. H. Miller assume the duty of selling and marketing the product of this company; that he shall receive for his service in that connection 50 cents per ton, for all business obtained by him for the company, whether on original or repeat order, and whether obtained directly or indirectly, such commission to be credited to his account on the books of the company; and against such amount, all advances, whether for travel expenses or otherwise, to be charged."

Following this action, L. H. Miller began selling the company's products, with no supervision on the part of the company or any officer. He travelled all over Texas, New Mexico, Colorado, Oklahoma, Kansas, Louisiana and Arkansas; paid his own expenses and drove his own car. He went where he wanted to go and when, and was under the control of no one in any particular. For the first five years of his work as sales agent of the company he did not make enough to cover his travel expenses, but afterward he got the sales

up to where his work was fairly profitable. His original agreement called for 50¢ a ton commission. He continued to serve the company on this basis until January, 1952, when the directors authorized a 25¢ increase in his commissions in order to cover the increased cost of travelling; such additional commission to be paid so long as he shall be actively selling the product of the corporation and in no case to interfere with or affect the previous agreement under which he had been operating.

After he began selling the company's product, Miller continued to be a director. Later he was elected to be Vice-President and General Manager, but was not at any time ever allowed any pay for any services rendered the corporation as such director, manager or vice-president.

On the basis of the evidence heard by him on the trial, Judge Rice found it to be a fact: "Luther H. Miller could not be, as long as Texas Carbonate Company is in existence, discharged. His contract expressly provides that the commissions are to be paid him whether he takes orders or not. *The work he has done as selling agent of the company's product entitles him to the commission as long as the company is in business.* (Tr. 118.) (Emphasis ours.)

No claim was ever made by the Internal Revenue Service that the company should pay FUTA and FICA taxes on miller until same was assessed for the years 1952 and 1953.

QUESTION PRESENTED

Texas Carbonate Company, as Plaintiff, on March 27, 1957, filed in the District Court for the Western District

of Texas at Austin suit by which it sought to recover FICA and FUTA taxes assessed, which were paid by it and refund was refused by the Defendant, on L. H. Miller, who by contract of March, 1939 "assumed the duty of selling and marketing Plaintiff's product for 50¢ per ton for all business obtained by him for the company, whether on original or repeat order, and whether obtained directly or indirectly, such commission to be credited to his account on the books of the company; and against such amount, all advances, whether for travel expenses or otherwise, to be charged". Miller was then a Director, was in 1941 made Vice-President and General Manager; but at the time for which the tax is claimed (1952-1953) he was only a Director and Vice-President, and was not General Manager. He had never at any time received any pay for any service rendered as director, vice-president or general manager, and has not collected any travel expense in performing any service in such capacities. He never rendered more than nominal service as such officers.

The question then is: Was he such an "employee" as that the company should have paid FUTA and FICA taxes when he drew no pay for the small service rendered by him as such officer of the corporation?

THE FACTS

The record shows that as Vice-President Miller presided over one meeting of the Board of Directors in the twenty years time since the company was organized; that the directors had asked him to get the company connected with the

REA electrical power line, they did not tell him who to see nor how to do it; that at one time he had talked about adding a new product and the directors offered to pay his way to Minneapolis for him to investigate the possibilities, but he determined it would be useless to go and he did not go and no one insisted that he go; that he had a few times collected past due accounts as an incident to his selling efforts, no one ever told him so to do; that a few times he had been in the company's office when Herbert Miller (who was in charge of the mill) was away, but he never was told by anyone to be there; once the directors asked him to raise the price, how was his business, no one gave him any help or orders; and no doubt in the twenty years involved he had done as many as eight or ten different things for the company, including the signing of income tax returns and such like; for all of which he received not one red cent and in none of them was he ever under orders from anyone as to the how, the where and the when!

One young witness, the son of a customer in Austin but who had no interest in such business, claimed that he thought Mr. Miller owned the Texas Carbonate Company. Certainly there was no reason for Mr. Miller to get this young man straightened out. No one else so testified.

The record clearly shows that he travelled all over Texas, New Mexico, Colorado, Oklahoma, Kansas, Louisiana and Arkansas in selling the product of the company, going where he wanted, when he wanted to go, and calling on whom he wanted to call on. He always paid his own expenses, and for the first five years he did not make enough to pay his travel

expenses. The record clearly shows that he never made any reports to anyone; he was never told to go see anybody; he was never told to go any place. He went where he wanted to go, stayed as long as he pleased, and he was under no obligation to obey the orders of anyone connected with the business. The selling of this product was his own independent business.

In this entire record there is not one instance in all the twenty years of L. H. Miller's selling this company's product where he was under the supervision of any one. In all that time when he was asked to do some service for the company no one told him when or how. He was asked to do a few things, and in not one single case in the twenty years covered from the beginning of the company up to now was the "how" of any job directed by any one. He did a job if he wanted, abandoned it if he wanted, and there is not one single case where anybody tried to make him do anything in any particular manner. There never was any one more completely his own boss. If he wanted to be away for two or three or four weeks, or months, to get a block of leases together and get a wildcat drilled, there was no question raised.

The trial court found: "Luther H. Miller could not be, as long as Texas Carbonate Company is in existence, discharged. His contract expressly provides that the commissions are to be paid him whether he takes orders or not. *The work he has done as selling agent of the company's product entitled him to the commission as long as the company is in business*" (Tr. 132.) (Emphasis ours.) This is clearly a finding that as to his sales effort Miller was an independent contractor.

Naturally, a corporation could not have a director or an officer whose term of office would continue over a long period of time, but this record shows that Miller had a vested interest in this sales contract to the extent of his commissions; and whether director or not, his rights under this contract would continue; because if he had not put in five years time, during which he did not make his expenses, this company would not have been able to make a go of its new business. The record shows that he did make it a success by his devoted, *unaided* selling efforts. The fact that the trial court made the finding that he did, as quoted above, clearly shows that L. H. Miller, insofar as the selling of the company's product was concerned, was a free agent and that he had the vested right to continue it just as long as there is any company; and the Circuit Court of Appeals was clearly in error in trying to wipe out this vested interest this man had in this sales contract. What difference does it make if he did not have an office; if he did not have any helpers; if he did not have any equipment other than his car? All he needed was his automobile and his samples, which he took all over the part of these United States in which his sales were made. It makes no difference whether he was an officer of the company. That was an entirely separate matter from the commissions that he earned on his sales. He never was paid a dime as an officer of the company, not even his expenses when trying to do something for it. His investment in *travel* and the *work* and the *time* and the *thought* and the *effort* in the creation of this company's business certainly entitled him to the vested interest which Judge Rice found that he owned in the commissions

provided by the contract under which he began the selling of this new product. The Appeals Court was not justified in trying to deprive him of this clearly valid interest which he had worked for over twenty years to create. This sales contract was in no sense dependent on his continuing to be an officer of the company. Our appeals courts have said many times findings of fact should not be set aside unless clearly erroneous.

It would seem that the case of *New Deal Cab Co. v. Fahs, U. S. Collector of Internal Revenue, 174 F. 2d 318*, Opinion by Circuit Judge Sibley for the Court of Appeals for the Fifth Circuit, would be determinative of this case. We quote:

> "(1) The statute levying the tax, Internal Revenue Code, Secs. 1400, 1600, 26 U.S.C.A. §§ 1400, 1600, speaks of 'wages', 'employer', and 'employment'. The Treasury Regulations (Reg. 106, sec. 402.204) defined thus:
>
> " 'Who are employees—Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee. Generally such employment exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and method by which that work is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. * * * In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not the means and methods for accomplishing the result, he is an independent contractor. An individual performing

services as an independent contractor is not as to such services an employee.'

"This is an excellent statement of the legal relations mentioned. The Courts, however, desiring to further the objects of the tax, overrode the Regulation in the cases relied on by the district judge and added other tests. The late Congress, however, with the purpose expressed in the committee reports to reestablish the common law tests as stated in the Regulation, amended Internal Revenue Code, Secs. 1420(d), and 1607(i), 62 Stats. 438, 26 U.S.C.A. §§ 1420(d), 1607(i), *so as to make common law rules applicable in determining the employer-employee relationship and the status of an independent contractor;* and the amendments were made retroactive to the date of the original enactment of the sections. Congress thus rebuked the overzeal of the courts in trying to make a better law than the words of Congress had made."

There has been no further change in the law, so why should this Court of Appeals be allowed to go back on the many opinions upholding the law as amended?

From this it would clearly appear that L. H. Miller, in the matter of his work of selling the product of Texas Corbonate Company, was an independent contractor and not an employee of the corporation, and the little jobs that he had done in the twenty years that he had been connected with the company certainly did not change his relationship in any way. If Judge Sibley was correct in his decision in the *Fahs* case, then Judge Jones is wrong in his opinion in the case now under consideration. Surely, we are not going back to extending the taxes after the Congress set aside what the Courts had done before.

CONCLUSION

It would seem that under the clear and simple facts as presented by the record, and the clear statement of the law as it has been amended by the Congress, and the previous decision of the very same court that has entered this judgment in this case, it is self-evident that such judgment was not correct and should be set aside, and this application for Writ of Certiorari should be granted in all fairness.

Respectfully submitted,

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Exhibit A

IN THE DISTRICT COURT OF THE UNITED STATES
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Civil Action No. 957

TEXAS CARBONATE COMPANY,

Plaintiff,

v.

R. L. PHINNEY, District Director of Internal Revenue,

Defendant.

This action came on to be tried before the Court, and the evidence adduced by the parties having been heard, and the Court having made its findings of fact and conclusions of law, it is hereby,

ORDERED, ADJUDGED and DECREED that judgment be entered for defendant, and that the complaint filed herein be dismissed with prejudice, with costs to abide the issue.

Entered this 25 day of Nov., 1960.

/s/ BEN H. RICE, JR.
District Judge

Exhibit B-1

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

October Term, 1961

No. 18,854

D. C. Docket No. 957 Civil
TEXAS CARBONATE COMPANY,
Appellant,

versus

R. L. PHINNEY, District Director of Internal Revenue,
Appellee.

Appeal from the United States District Court for the Western District of Texas.

Before Jones, Brown and Gewin, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

August 7, 1962

Issued: SEPT. , 1962

Exhibit B-2

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18854

TEXAS CARBONATE COMPANY,

Appellant,

versus

R. L. PHINNEY, District Director of Internal Revenue,

Appellee.

Appeal from the United States District Court for the Western District of Texas.

(August 7, 1962)

Before JONES, BROWN and GEWIN, Circuit Judges.

JONES, Circuit Judge: The appellant, Texas Carbonate Company, yielded to the demands of the District Director of Internal Revenue and paid the Unemployment Compensation and Social Security contributions which had been claimed with respect to payments made by Texas Carbonate to Luther H. Miller. Having paid the Government, the Company brought suit for a refund on the ground that

Miller was an independent contractor and was not an employee within the meaning of the statutes under which the contributions are levied. Miller was one of four stockholders of Texas Carbonate Company, owning twenty-five per cent. of its stock. Each of the stockholders was a director. The Company mined, processed and sold products derived from a deposit in Williamson County, Texas. Miller was in charge of sales of the Company's products. For his services he received 50¢ per ton on all sales, whether or not made by him. In 1941 the board of directors gave him the title of general manager but there was not then any change in the manner or rate of the payments to him. In 1943 he was elected vice president but ceased to have the title of general manager. His compensation, measured by sales, was increased from 50¢ to 75¢ per ton. In the minutes he was referred to as an independent contractor.

In various ways Miller rendered services to the Company. He presided at one directors' meeting. The collection of delinquent accounts, the investigation of markets for new products, and the preparation of advertising copy and arranging for its publication were committed to his charge. He shared executive responsibilities with the manager of the plant. For the Company it was contended that Miller could not be discharged, he drew no compensation as salary or wages, he would not be entitled, under the law of Texas, to state unemployment compensation if the Company should cease operations. It was the Company's position that Luther H. Miller was an independent contractor and not an employee, and hence the contributions were unlawfully ex-

acted. The district court, trying the case without a jury, resolved the issues in favor of the District Director. The question, a narrow one though not without its difficulties, is whether Luther H. Miller was an employee of Texas Carbonate Company within the meaning of the statutes during the years 1953 and 1954.

The Federal Insurance Contributions Act, 26 U.S.C.A. (I.R.C. 1939) § 1400 et seq., 26 U.S.C.A. (I.R.C. 1954) § 3101 et seq., defines employee to mean:

> "(1) any officer of a corporation; or
>
> "(2) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee; or
>
> "(3) any individual (other than an individual who is an employee under paragraph (1) or (2) of this subsection) who performs services for remuneration for any person.
>
> * * * * *
>
> "(D) as a traveling or city salesman, other than as an agent-driver or commission-driver, engaged upon a full-time basis, in the solicitation on behalf of, and the transmission to his principal (except for side line sales activities on behalf of some other person) of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations." 26 U.S.C.A. (I.R.C. 1939) §1426 (d), 26 U.S.C.A. (I.R.C. 1954) § 3121 (d).

In the Federal Unemployment Tax Act, 26 U.S.C.A. (I.R.C. 1939) § 1600 et seq., 26 U.S.C.A. (I.R.C. 1954) § 3301 et seq., the definition reads:

> "The term 'employee' includes an officer of a corporation, but such term does not include (1) any individual

who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (2) any individual (except an officer of a corporation) who is not an employee under such common law rules" 26 U.S.C.A. (I.R.C. 1939) § 1607 (i), 26 U.S.C.A. (I.R.C. 1954) § 3306 (i).

The statutory definition of "employees" as including officers of a corporation will not be so construed as to mean that an officer is an employee per se. Only such officers as work for it in fact are to be so included and, in determining whether an officer is an employee within the meaning of the statutes the usual employer-employee tests are to be applied. *Independent Petroleum Corporation v. Fly*, 5th Cir. 1944, 141 F. 2d 189, 152 A.L.R. 928; *United States v. Bernstein*, 4th Cir. 1949, 179 F. 2d 105; *United States v. Aberdeen Aerie No. 24*, 9th Cir. 1945, 148 F. 2d 655. The provisions of a resolution of the corporation that Miller was not to be under the control or direction of any of its officers is scarcely persausive since he was himself an officer and a large stockholder and control over him could be, and in some instances was, exercised by the Board of Directors as in permitting him to go to Minneapolis in search of a new market for the Company's product. The reference to Luther H. Miller in the resolution as an independent contractor will not make him such if the factual circumstances of his relationship to the Company fix his status as that of an employee. *Lumber Mutual Casualty Insurance Co. v. Stokes*, 4th Cir. 1947, 164 F. 2d 571.

No hard and fast rule can be stated for determining whether a particular relationship is one of employer and

employee or contractee and independent contractor, and the nature of the relationship is a question of fact to be determined from the facts of the particular case. 56 C.J.S. 45, Master and Servant § 3 (2); *Madison v. Phillips Petroleum Co.*, 5th Cir. 1937, 88 F. 2d 515, cert. den. 301 U. S. 703, 57 S. Ct. 946, 81 L. Ed. 1358; *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Higgins*, 2nd Cir. 1951, 189 F. 2d 865. Since the question is one of fact, our function on review is to determine whether there is a substantial basis in the evidence to support the fact determination made by the district court. *Commissioner v. Scottish American Co.*, 323 U. S. 119, 65 S. Ct. 169, 89 L. Ed. 113. Although the determination is to be made by common law concepts, a realistic interpretation of the term "employee" is to be adopted, and doubtful questions should be resolved in favor of employment in order to accomplish the remedial purposes of the legislation involved. *Westover v. Stockholders Publishing Co.*, 9th Cir. 1956, 237 F. 2d 948; *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Higgins, supra; Hearst Publications, Inc. v. United States*, D.C.N.D. Calif., 1946, 70 F. Supp. 666, aff. 168 F. 2d 751.

The absence of any right of Miller to Texas Unemployment compensation is not a factor in determining the relationship existing between him and the Company under the federal legislation which we are here considering. *American Oil Co. v. Fly*, 5th Cir. 1943, 135 F. 2d 491, 147 A.L.R. 824. The appellant has asserted that Miller could not be discharged and this is given as a reason for classifying him as an independent contractor. It is doubtful that the record

establishes the existence of any agreement for a permanent arrangement between the Company and Miller, but there seems to be no doubt, under the Texas law, that any such agreement would be ultra vires and invalid because contrary to the public policy of the state. *Leon Farms Corporation v. Beeman*, Tex. Civ. App. 240 S.W. 2d 433. Cf. *Denton Milling Co. v. Blewett*, Tex. Civ. App. 254 S.W. 236.

It is urged that there was an absence of control of Luther M. Miller in the performance of his work for the Company and this made him an independent contractor. This factor is to be considered and, though not controlling, is important. *Strangi v. United States*, 5th Cir. 1954, 211 F. 2d 305; *American Oil Co. v. Fly, supra.* Even though an absence of control is shown, and this as we have noted has not been done, the force of the factor is diminished to near de minimis by the fact that Miller himself was a member of the Board of Directors, a Vice President, and the executive of the Company in charge of its sales and the development of its markets. A commission basis of compensation is consistent with an employer-employee relationship. *Capital Life & Health Insurance Co. v. Bowers*, 4th Cir. 1950, 186 F. 2d 943; *Weatherguard Corporation v. United States*, 137 Ct. Cl. 359, 146 F. Supp. 942. So also an employee may be required to take care of his travel expense out of his commission compensation. *Moore-Handley Hardware Co. v. Williams*, 238 Ala. 189, 189 So. 757.

Luther H. Miller, in addition to being a stockholder, director and officer of the Company and in charge of the marketing of its product, participated in the determination

of policy and in management of the Company and its business. He engaged in no business activity for others, and his work for the Company was in no sense incidental to a separate or independent business or profession. Except for an automobile he had no capital investment other than his stock ownership, and he assumed no financial risks incident to his activity for the Company. The district court considered these and the other factors here recounted, and decided that Luther H. Miller was an employee of the appellant, Texas Carbonate Company. Our consideration had led us to the same conclusion. We find no error in the district court's judgment and it is

AFFIRMED.

A true copy
Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
By Clara R. James
Deputy
New Orleans, Louisiana
Sep 11 1962

(SEAL)